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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CYNTHIA GRELLA, Plaintiff and Respondent, v. R.A. LOTTER INSURANCE MARKETING, INC., Defendant and Appellant.	G052905 (Super. Ct. No. 30-2015-00801641) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Dinsmore & Shohl, Joshua M. Heinlein and Andrew K. Puls for Defendant and Appellant.

Aegis Law Firm, Samuel A. Wong and Ali S. Carlsen for Plaintiff and Respondent.

* * *

INTRODUCTION

Plaintiff Cynthia Grella filed a lawsuit against her former employer, defendant R.A. Lotter Insurance Marketing, Inc., alleging, inter alia, claims under the California Fair Employment and Housing Act (Gov. Code, §12940 et seq.). Defendant filed a motion to compel arbitration. The trial court denied the motion. Defendant contends the trial court erroneously concluded defendant failed to prove plaintiff had agreed to arbitrate her claims and that the arbitration provision in an agreement plaintiff signed was procedurally and substantively unconscionable.

We affirm. The arbitration provision is unenforceable because it failed to specify the applicable rules and procedures that would apply to the final and binding arbitration of a dispute between the parties.

BACKGROUND

In July 2015, plaintiff filed a complaint against defendant, alleging claims for (1) sex and pregnancy discrimination (Gov. Code, § 12940 et seq.); (2) disability discrimination (*id.*, § 12940, subd. (a)); (3) failure to reasonably accommodate; (4) failure to engage in the interactive process; (5) failure to prevent discrimination and retaliation; (6) retaliation; (7) violation of pregnancy disability leave (*id.*, § 12495); and (8) wrongful termination in violation of public policy.

The complaint alleged that in September 2013, plaintiff began working for defendant as a department case manager, and, in November 2013, she informed defendant that she was pregnant. In December 2013, plaintiff's pregnancy was deemed high risk and she requested that defendant permit her to work remotely; her request was denied. Plaintiff thereafter began a medical leave and delivered her baby in May 2014. Complications from plaintiff's pregnancy resulted in her undergoing a surgical procedure, and complications from that procedure resulted in the postponement of her

return-to-work date to August 25, 2014. On August 21, 2014, plaintiff was informed that her employment had been terminated as a result of a company-wide layoff.

Defendant filed a motion to compel arbitration of plaintiff's claims and to stay judicial proceedings on the ground that when plaintiff started working for defendant, she had signed an agreement entitled "Employee Proprietary Information and Inventions Agreement" (some capitalization omitted) (the Agreement), which included the following arbitration provision:

"**21. Arbitration.**

"It is in the interest of the Company and its employees that, whenever possible, disputes relating to employment matters be resolved quickly and fairly. Should any matter remain unresolved, and in consideration of the promises below and my employment with the Company, the Company and I agree as follows:

"The Company and I agree that final and binding arbitration shall be the exclusive remedy for any dispute between the Company and me, except for any claim that is non-arbitrable under applicable state or federal law. I understand that I am giving up no substantive rights, and this agreement simply governs forum.

"Arbitration hereunder shall be before a single arbitrator in the county in which the dispute arose and will be administered in accordance with the applicable arbitration rules and procedures of J.A.M.S. ('JAMS') or another alternative dispute resolution ('ADR') provider selected by the parties (except where the JAMS or other ADR provider's rules are contrary to applicable state or federal law), and California Code of Civil Procedure § 1280 *et seq.* The Company shall pay all costs uniquely attributable to arbitration, including the administrative fees and costs of the arbitrator (unless I voluntarily opt to pay up to one-half of such fees and expenses myself). Each party shall pay their own costs and attorney fees, if any, unless the arbitrator rules otherwise. If the law applicable to the claim(s) being arbitrated, or any agreement affords the prevailing party attorneys' fees and costs, then the arbitrator shall apply the same standards a court

would apply to award such attorneys' fees and/or costs. I understand that I shall not be required to pay any fee or cost that I would not be required to pay in a state or federal court action.

"If the parties cannot agree on an arbitrator, then the JAMS rules will govern selection. The arbitrator's award is to be in writing, with reasons given and evidence cited for the award. Any court of competent jurisdiction may enter judgment upon the award, either by (i) confirming the award or (ii) vacating, modifying, or correcting the award on any ground referred to in the Federal Arbitration Act or California Code of Civil Procedure § 1286 *et seq*.

"The provisions of this Arbitration section shall not be construed to create a contract of continued employment and in no way alters my status as an employee at will, permitting either myself or the Company to terminate my employment at any time, with or without cause or advance notice. The provisions of this Arbitration section can be modified only by a writing signed by the Chief Executive Officer of the Company and me, referencing these provisions and stating an intent to revoke or modify it. These provisions are severable, and if any provision is determined to be unenforceable, then the remaining provisions shall remain in full effect.

"Notwithstanding this section, however, a party may seek a temporary restraining order or injunction from a court of competent jurisdiction if such action is necessary to avoid irreparable damage."

Defendant produced evidence that plaintiff had signed a second agreement on September 17, 2013, entitled "USE OF L. RON HUBBARD MANAGEMENT TECHNOLOGY, which explained defendant's utilization of L. Ron Hubbard's management technology in its operations and how such use is "separate and distinct from the religious aspects of Scientology." The management technology agreement contained its own arbitration provision, stating in part: "The Company and I agree that final and binding arbitration shall be the exclusive remedy for any dispute between the Company

and me relating to this Agreement, except for any claim that is non-arbitrable under applicable state or federal law."

Plaintiff filed a written opposition to the motion to compel arbitration, arguing, inter alia, that the arbitration provision in the Agreement was ambiguous as to which arbitration rules would apply, did not specify the scope of discovery that would allow her to vindicate her statutory rights, and was both procedurally and substantively unconscionable.

The trial court denied defendant's motion to compel arbitration. At defendant's request, the trial court issued a statement of decision stating that the court found the arbitration provision unenforceable because defendant had not established the existence of an agreement to arbitrate the claims, and because the arbitration provision was both procedurally and substantively unconscionable. Defendant appealed.

DISCUSSION

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.)

Defendant contends the trial court erred by concluding that there was no agreement to arbitrate plaintiff's claims. The "'"[i]nterpretation of a written document where extrinsic evidence is unnecessary is a question of law for independent review by the Court of Appeal. [Citations.]"'" (*Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1169-1170.) We therefore review this issue de novo.

"California contract law applies to determine whether the parties formed a valid agreement to arbitrate. [Citations.] General contract law principles include that '[t]he basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] . . . "The words of a contract are to be understood in their ordinary and popular sense." [Citations.]' [Citation.] Furthermore, '[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' (Civ. Code, § 1641.)" (*Mitri v. Arnel Management Co.*, *supra*, 157 Cal.App.4th at p. 1170.)

Defendant produced evidence that on September 17, 2013, the parties signed the Agreement, which is entitled "Employee Proprietary Information and Inventions Agreement" (some capitalization omitted). The first paragraph of the Agreement states, inter alia: "In consideration and as a condition of my employment, or continued employment, by [defendant], and the compensation paid therefor, I agree to the terms of this Agreement." The Agreement includes several provisions set off by headings, including the six-paragraph arbitration provision quoted *ante*. The arbitration provision states that "final and binding arbitration shall be the exclusive remedy *for any dispute between the Company and me*" (italics added) and such an arbitration would be "administered in accordance with the applicable arbitration rules and procedures of J.A.M.S ('JAMS') or another alternative dispute resolution ('ADR') provider selected by the parties (except where the JAMS or other ADR provider's rules are contrary to applicable state or federal law), and California Code of Civil Procedure § 1280 *et seq*."

An arbitration provision is not rendered unenforceable simply because it is found in a document other than one entitled "employment" agreement or because it is contained within an agreement that does not set forth all of the terms and conditions of employment. The existence of a written employment contract is not necessary to establish an enforceable arbitration agreement of employment-related claims. (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 401-402 [that a

contract containing an arbitration provision states it is not a contract of employment does not render the arbitration agreement of employment claims unenforceable].) Here, the arbitration provision was contained in a document that had the word "agreement" in the title; plaintiff does not contend she was unaware she was signing a contract when she signed the Agreement.

The problem in this case is that the arbitration provision fails to identify *which* Judicial Arbitration and Mediation Services (JAMS) rules would apply if the parties did not agree to select another alternative dispute resolution provider. Defendant offered no evidence regarding which JAMS rules would apply in support of its motion to compel arbitration. In support of its objections to the trial court's proposed statement of decision, defendant filed the declaration of its attorney, Joshua M. Heinlein, which simply stated: "A true and correct copy of the JAMS Employment Arbitration Rules & Procedures is attached hereto as Exhibit A." Exhibit A to Heinlein's declaration is entitled "JAMS Employment Arbitration Rules & Procedures [¶] Effective July 1, 2014." Plaintiff and defendant signed the Agreement in September 2013. Thus, Heinlein's declaration and exhibit A, which refer to a version of JAMS rules that became effective 10 months after the Agreement was entered, only confirm the ambiguity regarding which rules would apply to the arbitration of any dispute between the parties. The arbitration provision's reference to the applicability of Code of Civil Procedure section 1280 et seq., alongside the unspecified JAMS rules, only exacerbates the degree of ambiguity and uncertainty regarding how final and binding arbitration proceedings would occur.

Significantly, defendant did not produce evidence of *any* JAMS rules in effect at the time the parties signed the Agreement, much less identify which set would apply. Defendant could have specified the type or version of JAMS rules in the arbitration provision, attached a copy of the governing rules, or provided information, such a Web site link, to plaintiff informing her where she might find the governing arbitration rules; defendant did not take any of these actions.

Given the arbitration provision's ambiguity regarding the governing rules and procedures, we cannot conclude the parties reached an agreement on the matter of submitting any and all disputes between them to final and binding arbitration. The trial court therefore did not err by denying the motion to compel arbitration. We therefore do not need to analyze whether the arbitration provision was procedurally and/or substantively unconscionable.

DISPOSITION

The order is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.